

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of) Nos. 82A-449 and
KENNETH G. AND NADINE E. DAY) 82A-450-MA
AND JOHN A. AND DARLENE)
DONALDSON)

Appearances:

For Appellants: Michael J. Christianson
Attorney at Law

For Respondent: Terry L. Collins
Counsel.

OP IN I O N

These appeals are made pursuant to section 18593^{1/} of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Kenneth G. and Nadine E. Day and John A. and Darlene Donaldson against proposed assessments of additional personal income tax in the amounts listed below for the year 1976:

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

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<u>Appellant</u>	<u>Amount</u>
Kenneth G. and Nadine E. Day	\$29,624.43
John A. and Darlene Donaldson	\$30,517.35

The sole issue raised by these appeals is whether appellants are entitled to the benefits of section 17402 involving nonrecognition of gain in certain corporate liquidations. Because of the identity of facts, issues, and legal principles involved in each case, the two appeals are consolidated for purposes of this opinion.

Section 17402 provides that under certain circumstances, a shareholder's gain on the complete liquidation of a corporation may go unrecognized, if he and enough other shareholders so elect. Among the requirements for section 17402 treatment is the timely filing of the proper forms electing such treatment. Section 17402, subdivision (d), provides, in relevant part, as follows:

The written elections... must be made and filed in such manner as to be not in contravention of regulations prescribed by the Franchise Tax Board. The filing must be within 30 days after the date of the adoption of the plan of liquidation . . . and may be made by the liquidating corporation or by its stockholders.

Section 17402 conforms to Internal Revenue Code section 333. Thus, federal law and regulations are highly persuasive regarding proper interpretation of this section, (Meaney v. McColgan, 49 Cal.App.2d 203 [121 P.2d 451 (1942)]; Rihn v. Franchise Tax Board, 131 Cal. App.2d 356 (280 P.2d 893) [1955].) Treasury Regulation section 1.333-3 provides, in relevant part, as follows:

An election to be governed by section 33.3 shall be made on Form 964 (revised) in accordance with the instructions printed thereon and with this section. The original, and one copy shall be filed by the shareholder with the district director with whom the final income tax return of the corporation will be filed. The elections must be filed within 30 days after the adoption of the plan of liquidation. Under no circumstances shall section 333 be applicable to any shareholders

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who fail to file their elections within the
30-day period prescribed_

(Treas. Reg. § 1.333-3 (1960).)

Accordingly, the basic question to be resolved in this appeal is whether appellants filed such **timely** elections with the Franchise Tax Board.

On November 11, 1976, appellants., as sole shareholders of Kenneth G. Day, Inc. (Day, Inc.); adapted a plan of liquidation pursuant to section 17402. In accordance with this plan, assets of Day, Inc., were distributed to appellant-shareholders in **exchange** for their stock in Day, Inc.

Appellants engaged an attorney whn specialized in tax matters to prepare the documents necessary to liquidate Day, Inc. Among the documents were Form 964, **to** be filed with the Internal Revenue Service on behalf of appellants electing the- provisions of section **333** of the Internal Revenue Code and FTB Form 3512, to be filed with respondent on- behalf of appellants, electing the provisions of section 174'02.

Respondent has no record of **receiving** a section **17402** election from appellants. After inquiry, respondent concluded that appellants had not filed such elections and, therefore, were ineligible for **the** deferral granted by section 17402. Respondent issued assessments reflecting adjustments to appellants' 1976 returns, and appellants protested. Respondent subsequently affirmed its assessments and appellants then filed these timely appeals.

Appellants contend that the **requisite** forms necessary for filing federal. and state elections were prepared to be mailed by certified mail and were mailed on November 15, 1976. Appellants are **unable** to provide any proof of mailing of the election. **The** post office receipt for certified mail offered **by** appellants was not stamped by the U.S. Postal Service.

Appellants argue that they have carried their burden of proof in establishing the timely filing of the elections required by section 17402 and that respondent has offered no factual evidence to the contrary other **than that** it **cannot** find a copy of the **election** on file. They further contend that even if respondent has no record of receipt of the required Form **3512 that** the

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purpose of section 17402 was fulfilled because all of appellants' filings with all concerned governmental offices clearly committed appellants to the course of action prescribed in section 17402 and thus served the purpose of that section.

This board has consistently **held** that the requirement to file a section 17402 election within 30 days is absolute and the failure to file in a timely manner may not be excused based upon a showing of reasonable **cause**. (See Appeals of Leonard S. and Erlene G. Cohen and Estelle Grossman, Cal. St. Bd. of Equal., Apr. 5, 1983, and cases cited therein,) Strict compliance with the statute is required, (Kelley v. Commissioner, ¶ 51,043 T.C.M. (P-H) (1951).) In order to prove **compliance** with the statute, appellants must **provide specific, contemporaneous and incontrovertible** evidence of filing a binding election in order to obtain the tax deferral granted by the one-month Liquidation provisions. (Dunavant v. Commissioner, 63 T.C. 316 (1974).) In the absence of such proof, the only available relief is legislative in **nature**.

Appellants hired an attorney who specializes in tax matters to file elections on their behalf. We assume that the attorney's experience **in such matters** certainly made him aware of the necessity of obtaining conclusive proof as to the timely mailing of the section 17402 election. We have been provided with **no** such proof, Appellants have not carried the burden of proof necessary to demonstrate that the election form was **actually** mailed to respondent. The receipt for certified mail which bears no stamp by the postal service only shows that the elections were prepared to be sent by certified mail, but does not prove that the elections were mailed. In addition, the "return receipt" **card** which **is** returned by the recipient to the sender of **certified** mail has not been produced, Neither the attorney nor his secretary **can** make a positive statement as to who actually mailed the elections. Based upon these facts, we conclude that appellants have not **carried their** burden of proof, Finally, we note that the fact that a **timely** election was filed with the Internal Revenue Service does not relieve appellants of the necessity of a timely California filing. A timely federal filing is irrelevant for purposes of proving filing for **California** purposes, (Appeals of Leonard S. and Erlene G. Cohen and Estelle Grossman, supra.)

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In keeping with our earlier decisions on this issue, we must sustain respondent's action since **appellants** have failed to demonstrate that they complied with the statutory election requirements.

